



Legislative BulletinMay 26, 2011

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Motion to Concur in the Senate Amendment to the House Amendment to S.990— PATRIOT Sunsets Extension Act of 2011 (*Landrieu, D-LA*)

Order of Business: The Senate Amendment to the House Amendment to S.990 will be considered tonight under a yet to be determined (but presumably a closed) rule.

Summary: The Senate Amendment to the House Amendment to S.990 extends by four years two expiring provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and one provision of the Intelligence Reform and Terrorism Prevention Act of 2004 scheduled to expire at 12:01am, Friday, May 27, 2011. The three provisions are: Foreign Intelligence Service Act (FISA) roving wiretaps provision (Section 206), FISA business records provision (Section 215), and the “lone-wolf” provision (Section 6001(a) of the Intelligence Reform and Terrorism Prevention Act).

This [bill](#) originally passed the House by voice vote this past Tuesday as an extension to Small Business programs set to expire. It now has become the Senate vehicle that extends the expiring PATRIOT Act provisions.

Additional Background: The original USA Patriot Act (H.R. 3162 in the 107th Congress) passed in the House by a vote of 357-66, in the Senate by a vote of 98-1, and was signed into law by President George W. Bush on October 26, 2001—45 days after the 9/11 terrorist attacks. 14 of its 16 original provisions were made permanent by the [USA Patriot and Terrorism Prevention Reauthorization Act of 2005](#). But provisions on “roving wiretaps” (section 206) and access to business documents (section 215) were given 4 year extensions due to concerns by some at that time that they overstepped boundaries on civil liberties. Those two provisions and the "lone wolf" measure, section 6001(a) of the Intelligence Reform of Terrorism Prevention Act of 2004 intelligence law, have required numerous temporary extensions as lawmakers debated how best to ensure that they were not abusing individual rights while upholding the national security interests of the nation.

On February 8, 2011, a bill to extend these three expiring provisions from February 28, 2011 until December 8, 2011 (H.R. 514) [failed](#) to receive the required two-thirds majority vote for passage under suspension of the rules. On Monday, February 14, 2011, this bill

was brought up again under a [closed rule](#) and passed by a vote of [275-144](#). The next day, by unanimous consent, the Senate amended H.R. 514 by shortening the extension for these three expiring provisions from December 8, 2011 to May 27, 2011. The House [passed](#) the Senate amendment and the President signed this extension into law on February 25, 2011. All three of these provisions are scheduled to expire at 12:01am, Friday, May 27, 2011.

The Three Expiring Provisions

Roving Wiretaps: Section 206 of the original 2001 USA Patriot Act (Patriot Act) added flexibility to the degree of specificity of the location or facility subject to electronic surveillance by intelligence officers in foreign intelligence investigations under FISA that must be identified. It established authority for the federal government to obtain FISA court orders for multipoint or “roving” wiretaps. These FISA court orders do not need to specifically identify or name individual targets when targets take actions to thwart surveillance. Thus, a single roving wiretap FISA court order may cover multiple locations, establishments, or neighborhoods because the target is being evasive and intentionally using multiple communication devices (rather than a single cell phone that could be more easily wiretapped). This provision is widely referred to as a “John Doe wiretap” since it allows for a surveillance order without authorities having to name a specific person under surveillance.

This roving wiretap authority has been similarly available for criminal investigations since 1986. To obtain a FISA court order, intelligence agents must establish all factors needed to gain court approval for traditional criminal wiretap including:

1. establishing probable cause that the target of the surveillance is a foreign power or agent of a foreign power;
2. probable cause that the device is being used or about to be used by a foreign power or agent of a foreign power; and
3. that the actions of the target may have the effect of blocking their identification.

The 2005 reauthorization of this section requires intelligence officers to notify the FISA Court within 10 days after “surveillance begins to be directed at any new facility or place.”¹ Additionally, the FISA court must be told the nature and location of each new facility or place, the facts and circumstances relied upon to justify the new surveillance, a statement of any proposed minimization procedures (i.e., rules to limit the government's acquisition and dissemination of information involving United States citizens) that differ from those contained in the original application or order, and the total number of facilities or places subject to surveillance under the authority of the present order.

¹ [P.L. 109-177](#), § 108(b)(4), *codified at* 50 U.S.C. § 1805(c)(3) (2008). This deadline for notification can be extended to up to 60 days by the FISC upon a showing of good cause.

According to testimony in a March 2011 congressional [hearing](#) by Todd Hinnen, the Acting Assistant Attorney General for the Justice Department's National Security Division, the government sought "roving wiretap" authority approximately 20 times per year between 2001 and 2010.

Potential Conservative Concerns with respect to Section 206 Roving Wiretaps

→ *Fourth Amendment Concerns:* The Fourth Amendment to the Constitution requires the government to obtain a search warrant for searches of "persons, houses, papers, and effects" and states that warrants shall particularly describe the place or person to be searched. Under FISA, roving wiretaps are not required to identify the location or a named target that may be subject to surveillance. Some conservatives may argue that roving wiretaps violate the "particularity requirement" of the Fourth Amendment because these wiretaps increase the likelihood that innocent conversations will be subjected to electronic surveillance—the threat of which is exactly the reason the particularity clause of the Fourth Amendment is designed to prevent.

Other conservatives maintain that without roving wiretap authority, investigators would be forced to seek a new court order each time they need to change the location, phone, or computer that needs to be monitored, and, therefore, critical investigations would be hindered. Also, supporters maintain that no final, unappealable decision of any appellate court has held any part of the Patriot Act to violate the Fourth Amendment.

Business Records: Section 215 of the Patriot Act expanded the government's access to materials in investigations to obtain foreign intelligence information. Prior to section 215's enactment, FISA authorized the production of documents under four categories including records from common carriers, public accommodation facilities, storage facilities, and vehicle rental facilities. This section permits the federal government to seek approval from the FISA court for orders granting the government access to any "tangible items," including books, records, papers, and other documents in foreign intelligence, international terrorism, and clandestine intelligence cases.

This provision is widely referred to as the "Library" provision because the library community voiced strong concerns over the expanded scope of review created under a FISA order. In response to these concerns, a library-specific amendment was made to the section 215 procedures in the 2005 Patriot Act reauthorization. Under this amendment, government requests for "library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person" must be first approved by the FBI Director, the Deputy Director, or the head of the FBI's National Security Division.

The government seeks warrants for business records approximately [40 times](#) a year.

Potential Conservative Concerns with respect to Section 215 Business Records

→ *Lower standard of review to obtain court approval:* Before enactment of section 215, an applicant had to show “specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.” Currently, the applicable standard requires “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are *relevant* [emphasis added] to a foreign intelligence, international terrorism, or espionage investigation.”

Conservatives who support this provision maintain that there are many protections written into FISA to prevent abuses of this authority such as that only a FISA judge can issue an order for business records; an investigation of a U.S. person cannot be based *solely* on activities protected by the First Amendment; the records must be for a foreign intelligence or international terrorism investigation; and minimization procedures— to limit the its acquisition and dissemination of citizen’s information— must be implemented.

→ *Department of Justice (DOJ) Office of Inspector General Report:* The DOJ Inspector General released an unclassified audit for calendar year 2006 in March of 2008 that noted some concerns with implementation of section 215 including the absence of procedures for when providers of section 215 requests for documents submit information outside the scope of the order and that the government’s interim minimization procedures were inadequate.

Lone Wolf: Section 6001(a) of the Intelligence Reform and Terrorism Prevention Act of 2004 amends the definition in FISA of an “agent of a foreign power” subject to a FISA court order to include a foreign national who is preparing for or engaging in international terrorism. This section permits surveillance of non-U.S. persons engaged in international terrorism without requiring evidence linking those persons to an identifiable foreign power or terrorist organization. The lone wolf definition cannot be relied on to investigate U.S. persons, and only applies in cases of suspected international terrorism.

Potential Conservative Concern with respect to Section 6001(a) “Lone Wolf”

→ *Absence of its usefulness:* A recent Judiciary Committee [report](#) for a bill the Committee recently reported out favorably (H.R. 1800) extending these expiring provisions explains that the government has never used the long wolf provision. Some conservatives question whether lone wolf terrorists can be surveilled using traditional criminal wiretaps obviating the need to extend this provision.

Other conservatives argue that lone wolf is a necessary investigative tool to assist in monitoring suspected terrorists. Supporters argue that the absence of this authority prevented the FBI from obtaining a FISA warrant to search the laptop of Zacarias Moussai, one of the individuals believed to be responsible for the 9/11 terrorist attacks.

Shortly before the attacks, Moussaoui had been in federal custody on immigration charges (due to being present in the United States with an expired visa). The FBI agents then sought a court order under FISA to examine the contents of Moussaoui's laptop computer. Yet, the court apparently concluded that it had insufficient information at the time to link Moussaoui to being an agent of a foreign power as then required by FISA.²

Outside Groups Supporting Extension of these Provisions

The Committee [report](#) for H.R. 1800 that extends these three provisions mentions the following groups supporting these extensions: FBI agents Association, the Society of Former Special Agents of the Federal Bureau of Investigation, Inc., the Federal Law Enforcement Officers Association, the Sergeants Benevolent Association (Police Department, City of New York), the National Association of Assistant United States Attorneys, the National District Attorneys Association, the National Fraternal Order of Police, the Major County Sheriffs' Association, and Keep America Safe.

Outside Groups Opposing Extension of these Provisions

The Dissenting Views in the same Committee report cite the American Civil Liberties Union and the Electronic Frontier Foundation as opposing extending these provisions. A footnote on page 19 of the report highlights that the following civil liberties and law reform organizations opposed the 2005 reauthorization of these three expiring provisions. The Center for Constitutional Rights, American Immigration Lawyers Association, American Library Association, the Center for Democracy and Technology, Common Cause, Free Congress Foundation, Gun Owners of America, Lawyers' Committee for Civil Rights, NAACP, National Association of Criminal Defense Lawyers, American Policy Center, Arab American Institute, and many others.

Committee Action: The version of the legislation on the floor today has not been considered by any House committee. As mentioned above, a similar bill (H.R. 1800) addressing the extension of the "roving wiretaps" and business records by six years and to permanently extend the lone wolf provision received three hearings in the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on March 9, 2011, March 30, 2011, and May 11, 2011. On May 12, 2011, the full Committee reported H.R. 1800 out favorably by a roll call vote of 22 to 13.

Administration Position: The Administration released a Statement of Administration Policy this afternoon that "strongly supports" enactment of S. 990.

Cost to Taxpayers: No CBO score was available at press time.

Does the Bill Expand the Size and Scope of the Federal Government?: No. *Note:* Without extending these intelligence authorities set to expire, the government would be unable to secure court warrants for new investigations, but it could still obtain court

² Nat'l Comm. on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report*, at 274

authority in the case of foreign intelligence investigations that were already under way before the provisions expired.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: There is no indication whether the bill complies. However the Committee report for H.R. 1800 states that in accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1800 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Constitutional Authority: The bill does not contain a Constitutional Authority Statement. However, Rep. Sensenbrenner’s Constitutional Authority Statement for H.R. 1800 submitted into the Congressional Record upon introduction on May 6, 2011 states: “Congress has the power to enact this legislation pursuant to the following: The authority to enact this bill is derived from, but may not be limited to, Article I, Section 8, Clauses 1 and 3 of the United States Constitution.”

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